

**Before the
Federal Communications Commission
Washington, DC**

In the Matter of)	
)	
Request for Review of the Decision of the)	CC Docket No. 02-6
Universal Service Administrator by)	
)	
Pueblo City School District 60)	
Pueblo, CO)	SLD File Nos. 650387
)	and 696098
Schools and Libraries Universal Service)	
Support Mechanism)	

REQUEST FOR REVIEW OR WAIVER

Pueblo City School District 60 (“School District”), by its representative, hereby requests that the Commission review and reverse the decision of the Universal Service Fund Administrator (“USAC”) in its Form 486 Notification letter, dated October 27, 2010, to reduce three of the School District’s Funding Year 2009 funding requests¹ because of late-filed Forms 486. In addition, the School District hereby appeals the related Form 472 (BEAR) Notification letter, dated November 24, 2010. There, USAC rejected the School District’s reimbursement requests because the service start dates for the FRNs appearing on those forms preceded the adjusted service start dates that USAC had assigned to those FRNs previously because of the allegedly late-filed 486 forms. In the alternative, the School District requests that the Commission waive its rules and direct USAC to restore funding, in full, to all of the FRNs in issue and, additionally, to waive any other procedural rules that may be necessary to effectuate the Commission’s Order.

Originally, the problem the School District faced was that it had filed its 486 forms too soon, rather than too late. Consequently, the School district canceled that filing, per USAC’s instructions. Thereafter, during the time that it was supposed to re-file, the School District went through a series of senior management and other changes.

¹ FRNs 1848573, 1913013 and 1912965

Those changes had a ripple effect throughout the organization. Unfortunately, the time for re-filing slipped away quickly during that very difficult period, so much so in fact that when the School District finally realized what had happened, it was almost too late to re-file. Indeed, so much time had passed that when USAC readjusted the service start dates to account for the late re-filing, only a small fraction of the School District's original funding commitments remained.

The School District contends that USAC used the wrong date for Form 486 filing date purposes, that the School District's Forms 486 should have been considered filed and the requisite CIPA and other certifications made as soon as the School District filed its original forms. Therefore, USAC's decision to readjust the Form 486 service delivery start dates due to late re-filing of the forms was incorrect.

In the alternative, the School District contends that the facts warrant a waiver of the USAC's Form 486 deadline rules. Among other things, the procedural rules that apply to the Form 486 process are extremely confusing, as the numerous Form 486-related cases that have come before the Commission clearly show. Senior management changes, staff promotions, and more responsibilities being assigned to the School District's E-rate Reimbursement Coordinator only added to the confusion. Moreover, the School District did in fact prepare and file the requisite forms, albeit slightly early, and comply with E-rate program rules in all other respects.

FACTS

The School District has been filing its 486 forms in October for years. October 2009 was no different. On October 20, 2009, before it had received a Funding Commitment Decision Letter (FCDL) for any of its three funding requests, the School District filed two 486 forms for the three FRNs, unaware that it was filing them prematurely. (Exhibit 1).

On November 3, 2009, in response to the School District's filing, USAC sent an e-mail to the School District. (Exhibit 2). It began by explaining, "We are making this

contact with you to obtain the necessary information to successfully data enter your E-rate form...We need the following information from you so that we may complete data entry:" However, instead of listing missing information, USAC directed the School District to cancel its 486 forms:

"On these forms you listed the FRNs 1913013, 1848573, and 1912965 which are not funded. I will need for you to send me a request to cancel these forms."

On November 17, 2009, per USAC's instructions, the School District canceled the 486 forms it had just filed. (Exhibit 3). On December 8, USAC issued FCDLs for all of the funding requests that had appeared on the canceled forms (Exhibit 4) and, on April 13, 2010, sent a reminder notice about filing 486 forms. (Exhibit 5).

It is important to note that, during this entire time period, the School District was in the throes of a management crisis. The superintendent had left during the summer and was not replaced until September, just as the new school year was getting underway. That relationship, unfortunately, did not work out. The School District terminated the new superintendent's contract the following summer and hired an interim replacement shortly thereafter. To complicate matters further, the Chief Financial Officer, under whom the School District had developed its E-rate application, reimbursement and related processes, also retired during the summer of 2009, and eventually was replaced by the current CFO. Also during this time, the School District promoted its Accounting Supervisor, Cassie Walgren, its E-rate Reimbursement Coordinator, to Budget Supervisor. For her, this meant taking on new, more difficult and stressful responsibilities, which the changes at the top of the leadership ladder only served to magnify. In addition, because the School District, as a practical matter, had no one else it could give them to, Ms. Walgren had to retain all of her E-rate management responsibilities too. In this difficult environment, which included a wide variety of other pressing E-rate matters and concerns, all of which required a great deal of time and attention, it is not difficult to understand why the need to re-file the previous funding

year's 486 forms might have been missed. Of course that should not have happened, and the School District regrets that it did.

As mentioned before, October historically is the month that the School District sets aside for concentrating on filing 486 forms. When it began the process in October 2010, the School District was surprised to discover that the canceled 486 forms from the previous funding year had not yet been re-filed, so it took care of that immediately. (Exhibit 6). On October 27, 2010, the related Form 486 Notification Letter arrived from USAC (Exhibit 7), and the School District followed that up right away by filing a Form 472 (BEAR) reimbursement request. (Exhibit 8).

At the time, however, the School District did not realize that USAC had changed the service start dates because the School District had re-filed its 486 forms late. Nor did it appreciate yet how drastically that alteration would affect the amount of funding to which the School District would be entitled, especially since it had worked so hard to follow all of the rules. That realization would occur not too long afterwards, when it learned from USAC's November 24th Form 472 (BEAR) Notification letter that USAC was rejecting its reimbursement requests because the School District had listed the original service start dates for the FRNs on those forms, rather than the later dates that USAC had assigned to them as a result of the Form 486 problem. (Exhibit 9). On December 7, 2010, the School District re-filed the BEAR forms for the lesser amounts, hoping to salvage at least some funding. (Exhibit 10).

ISSUE – Request for Review

WHETHER, FOR SERVICE DELIVERY START DATE PURPOSES, USAC ERRED BY NOT RECORDING THE SCHOOL DISTRICT’S FIRST FORM 486 FILING DATE AS THE OFFICIAL FORM 486 FILING DATE.

DISCUSSION

USAC’s Assertion That The School District Filed Its 486 Forms Late For Form 486 Service Delivery Start Date Purposes Is Incorrect. Therefore, USAC’s Conclusion That The FRN Service Delivery Start Dates Had To Be Adjusted Forward Because Of That Late Filing Is Also Incorrect.

E-rate program rules require applicants to notify USAC when service begins by filing a Form 486. As USAC explains on its website, “USAC cannot process a payment related to a Funding Request Number (FRN) unless a properly completed Receipt of Service Confirmation Form (Form 486) has been submitted by the applicant and processed for that FRN.”² USAC goes on to explain that “The Form 486 must be postmarked no later than: 120 days after the Service Start Date featured on the Form 486, or 120 days after the date of the Funding Commitment Decision Letter, whichever is later.”

When the School District filed its first set of 486 forms on October 20, 2009, they were complete and properly executed. USAC does not dispute that. And because they were filed no more than 120 days after the July 1 service start date featured on the Form 486, they were not filed late for any notice or certification purpose, including CIPA. USAC does not dispute that either. Finally, USAC did not reject the School District’s forms, but rather, instructed the School District to cancel them. For these reasons, as discussed in more detail below, the School District contends that it filed its original 486 forms on time, and, therefore, USAC should not have cut the School District’s E-rate funding solely because, by mistake, it re-filed the exact same forms late the second time around.

² <http://www.universalservice.org/sl/applicants/step10/form486-deadlines.aspx> (12/22/10).

At the time of the filing, these were the circumstances: (1) the 2009 funding year had already started; (2) the School District's service providers were already billing for their services; and (3) the School District was already paying for those services in full. It made perfect sense, therefore, for the School District to be proactive and file the necessary 486 forms. Note that there was no danger of USAC mistakenly paying either a service provider invoice or a reimbursement request because of the early filing, since the FRNs had no funding attached to them yet in USAC's system. As soon as they did, though, payment could be made, which would help to expedite the process.

What the School District was unaware of at the time was that it had filed its 486 forms prematurely. As USAC points out on its website (on a page that is easy to miss because it is separate from where its Form 486 deadline information appears), applicants may not file a Form 486 for a funding request until a funding commitment for it has been received.³ Ironically, it was this, the School District's attempt to be compliant and proactive, that ultimately cost it hundreds of thousands of dollars in badly needed E-rate support.

What USAC did next, after the School District filed its forms, was surprising. Rather than rejecting the School District's 486 forms because the School District filed them too soon, which would have made sense under the circumstances, instead USAC instructed the School District to cancel them. That instruction, we submit, only makes sense if USAC would have had to accept them as "filed" for Form 486 filing purposes -- if the School District had refused to cancel them. As it makes sense that USAC would prefer not to have to deal with early-filed 486 forms and, moreover, as it is the only reasonable inference to be drawn from these facts, the logical conclusion is that the School District's 486 forms actually had been "filed" until it canceled them at USAC's direction.

³ <http://www.universalservice.org/sl/applicants/step10/form486-filing-information.aspx> (12/22/10)

It stands to reason that if USAC has no legal authority to accept a prematurely filed Form 486, USAC would have no reason to instruct an applicant to cancel a Form 486 that it had filed too soon. USAC would simply reject the form outright, explaining that it had no authority to accept it. What would be the point of making an applicant go through the meaningless exercise of canceling a form that USAC had no authority to accept in the first place? Presumably, USAC does not engage in either legally meaningless acts or make-work. Conversely, if USAC could accept early-filed 486 forms, then it makes sense that USAC would direct applicants to cancel them for its own administrative convenience.

What all of this means, we submit, is that the School District did not “file” its original 486 forms late. It may have filed them prematurely, but it did “file” them. Therefore, for Form 486 service start notification purposes, CIPA certification and any other formal purpose, that date, October 20, 2009, should be recorded as the official filing date.

In the final analysis, but for USAC’s instructions to the School District to cancel its forms, the Form 486 filing dates would never have become an issue. Therefore, we respectfully request that the Commission instruct USAC to change all of the Form 486 filing dates to October 20, 2009, to readjust all of the FRN service start dates back to their original dates, and to restore full funding to all of the funding requests in issue here.

ISSUE – (Alternatively) Request for Waiver

WHETHER THE CIRCUMSTANCES SURROUNDING THE LATE FORM 486 RE-FILING MAKE STRICT COMPLIANCE WITH USAC’S PROCEDURAL RULES INCONSISTENT WITH THE PUBLIC INTEREST.

DISCUSSION

Strict Compliance With The Rules Would Be Inconsistent With The Public Interest Because, Among Other Things, The Form 486 Filing Deadline Rules Are Procedural And Extremely Confusing, And The School District Filed The 486 Forms Late Because It Followed USAC’s Instructions To Cancel The Forms It Filed Early and Then, Re-Filed Them Late In Part Because Of A Senior Management Crisis.

The Commission may waive any provision of its rules for good cause shown.⁴ A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.⁵ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁶ In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.⁷

For numerous applicants, like the School District here, the Form 486 process has proved especially vexing, resulting in late or missed filings, along with the resultant loss or reduction in funding.⁸ When those matters have come before the Commission, it has been extremely sensitive to the difficulties involved in and the confusing nature of the process, and the realities with which applicants must deal everyday as they do their best to abide by the program’s many and complex rules. Indeed, in this regard, the

⁴ 47 C.F.R. §1.3.

⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972).

⁷ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

⁸ *See Request for Review of the Decision of the Universal Service Administrator by Children of Peace School, Schools and Libraries Universal Service Support Mechanism, File Nos. SLD-469413, et al.*, CC Docket No. 02-6 (Wireline Comp. Bur. 2010), (*Children of Peace School*).

Commission has made it a point to note that “the primary jobs of most of the people filling out these forms include school administrators, technology coordinators, and teachers, as opposed to staff dedicated to pursuing federal grants... .”⁹ Thus, the Commission has found repeatedly, not only in cases similar to this one but also in others where the case for waiver was far less compelling, that waiver of the Form 486 deadline is warranted where: (1) staff mistakes or circumstances beyond the applicant’s control led to the applicant’s Form 486 filing problem, (2) there was no evidence of waste, fraud or abuse, and (3) the applicant had otherwise adhered to the program’s core requirements.¹⁰

Here, the case for waiver is especially strong, as the School District did not file its 486 forms late; it filed them early. The problem was that USAC directed it to cancel them and, when the time came to file them again, was unable, unfortunately, to do so on time. Why this happened is not entirely clear. What is, though, is that the School District was in the throes of a serious management crisis during that time and, moreover, the staff person, who had primary responsibility for E-rate reimbursement filings, had just been promoted, adding even more duties and responsibilities to her already very full plate. It is important to note too, of course, that in all other respects, the School District had complied and continues to comply fully with program rules and procedural requirements, and there is no allegation whatsoever that the School District was involved in any waste, fraud or abuse.

Finally, inasmuch as the School District’s alleged Form 486 violation is not a substantive violation, but rather, a violation of one of USAC’s procedural deadlines, and

⁹ *Ibid* at para. 7

¹⁰ See, e.g., *Ibid*; *Request for Review of the Decision of the Universal Service Administrator by Alaska Gateway School District, Tok, AK, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-412028, *et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 10182 (Wireline Comp. Bur. 2006) (*Alaska Gateway School District*) (finding good cause to waive USAC’s deadline for FCC Form 486 for several applicants); *See Requests for Waivers of the Decisions of the Universal Service Administrator by Alcona County Library, Harrisville, Michigan, et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-425479, *et al.*, CC Docket No. 02-6, Order, 23 FCC Rcd 15500 (Wireline Comp. Bur. 2008) (*Alcona County Library*) (finding good cause to waive USAC’s deadline for FCC Form 486 for several applicants).

the Commission has granted waivers both in similar and less compelling cases,¹¹ the School District respectfully requests that the Commission (1) waive USAC's procedural rules and direct USAC to restore funding in full to all of the funding requests in issue; and (2) instruct USAC to waive any other of its procedural rules that may be necessary to effectuate the Commission's Order.

Respectfully submitted
on behalf of Pueblo City School District 60,
/s/ Cathy Cruzan

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¹¹ See *Children of Peace School* at n. 17 (Form 486 deadline waivers granted where applicants claimed: staff changes affected filing; new staff and confusing rules resulted in the late filed Form 486; superintendent, now placed on administrative leave, did not properly ensure all E-rate documents were filed on time; staff changes affected filing; E-rate staffer, now retired, did not properly ensure all E-rate documents were filed on time; consultant previously assisting the school with E-rate filings was confused about the rules; the Form 486 was late due to a recent change in contact information; it failed to timely file the Form 486 due to confusion over program rules; the Form 486 was filed late due to new staff having no recent experience with E-rate; new staff and confusion resulted in the Form 486 being filed late; the staffer was inexperienced; it thought it filed the Form 486 electronically but later found that it was not submitted; staff changes affected filing; it never received the Urgent Reminder letter sent by USAC; due to an unexpected change in administrative procedures at the school district, a series of ministerial and procedural errors occurred and caused a breakdown in the flow of FCC paperwork; confusing rules affected filing; personnel issues caused the Form 486 to be filed late; Form 486 was not filed because of administrative changes and a new E-rate staffer who was unfamiliar with E-rate.)